

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SCOTT JOHNSON,
Plaintiff,
v.
CASE VENTURES, LLC,
Defendant.

Case No. 5:19-cv-02876-EJD

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Re: Dkt. No. 28

Plaintiff Scott Johnson (“Plaintiff”) sued Defendant Case Ventures, LLC (“Defendant”) alleging violations of Americans with Disabilities Act of 1990 (“ADA”) and the California Unruh Civil Rights Act. *See* Complaint for Damages and Injunctive Relief (“Compl.”) ¶¶ 24–37, Dkt. 1. Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant requests that this Court dismiss Plaintiff’s action as moot. Having considered the Parties’ papers, the Court **GRANTS** Defendant’s motion to dismiss.¹

I. BACKGROUND

A. Factual Background

On May 24, 2019, Plaintiff, a level C-5 quadriplegic, filed a lawsuit against Defendant, who owns the real property located at 15585 Monterey Road, Morgan Hill, California where it operates a general orthopedic practice (“the Property”). Compl. ¶¶ 1–4. Plaintiff alleges that he went to the Property on three occasions (twice in January 2019 and once in March 2019) and that during these visits Defendant failed to provide accessible (1) parking and (2) paths of travel

¹ Pursuant to N.D. Cal. Civ. L.R. 7-1(b) and General Order 72-5, this Court found this motion suitable for consideration without oral argument. Dkt. 31.

1 leading to and into the office building. *Id.* ¶¶ 12, 15. Plaintiff alleges these barriers continue to
2 exist and that they deter him from returning to the Property. *Id.* ¶¶ 13, 16, 22.

3 On September 19, 2019 the parties conducted a joint site inspection pursuant to General
4 Order 56. Declaration of Christopher J. Olson (“Olson Decl.”) ¶ 6, Dkt. 28-1. Defendant
5 contends that it has remedied the barriers to access and has obtained a certification from Bassam
6 Altwal, a California Certified Access Specialist, to that effect. *Id.* ¶ 8; Declaration of Bassam
7 Altwal (“Altwal Decl.”), Dkt. 30-1.

8 **B. Procedural History**

9 On April 2, 2020, Defendant filed a motion to dismiss Plaintiff’s action for lack of subject-
10 matter jurisdiction. *See* Defendant’s Notice of Motion and Motion to Dismiss Plaintiff’s
11 Complaint (“Mot.”), Dkt. 28. Plaintiff filed his opposition on April 21, 2020. Plaintiff’s
12 Opposition to Defendant’s Motion to Dismiss (“Opp.”), Dkt. 29.² On April 24, 2020, Defendant
13 filed its reply. Defendant’s Reply (“Reply”), Dkt. 30.

14 **II. LEGAL STANDARD**

15 To contest a plaintiff’s showing of subject-matter jurisdiction, a defendant may file a Rule
16 12(b)(1) motion. Fed. R. Civ. P. 12(b)(1). A defendant may either challenge jurisdiction
17 “facially” by arguing the complaint “on its face” lacks jurisdiction or “factually” by presenting
18 extrinsic evidence (affidavits, etc.) demonstrating the lack of jurisdiction on the facts of the case.
19 *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Safe Air for Everyone v. Meyer*, 373 F.3d
20 1035, 1039 (9th Cir. 2004).

21 “In a facial attack, the challenger asserts that the allegations contained in a complaint are
22 insufficient on their face to invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039. 2005). The
23 court may not consider evidence outside the pleadings when deciding a facial attack. *See, e.g.*,
24 *MVP Asset Mgmt. (USA) LLC v. Vestbirk*, 2011 WL 1457424, at *1 (E.D. Cal. Apr. 14, 2011).

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26 ² The Court recognizes that Plaintiff’s Opposition was filed late. However, because the Court is
27 granting Defendant’s Motion and because the Court must evaluate mootness independently, the
28 Court still uses Plaintiff’s Opposition to guide its analysis.

1 In contrast, in resolving a factual attack, the district court may review evidence beyond the
2 complaint without converting the motion to dismiss into one for summary judgment. *Safe Air*, 373
3 F.3d at 1039. No presumptive truthfulness attaches to the plaintiff's allegations and the existence
4 of disputed material facts will not preclude the trial court from evaluating the merits of
5 jurisdictional claims. *Gregory Vill. Partners, L.P. v. Chevron, U.S.A., Inc.*, 805 F. Supp. 2d 888,
6 895 (N.D. Cal. 2011). Further, once the defendant presents extrinsic evidence, the plaintiff must
7 establish jurisdiction with evidence from other sources. *Id.*; *see also Savage v. Glendale Union*
8 *High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

9 When the jurisdictional issue is intertwined with the merits, a court must "apply the
10 summary judgment standard in deciding the motion to dismiss." *Johnson v. Cal. Welding Supply*
11 *Inc.*, 2011 WL 5118599, at *3 (E.D. Cal. Oct. 27, 2011). The court may not resolve any genuinely
12 disputed material facts. *Safe Air*, 373 F.3d at 1039 (explaining that because jurisdictional and
13 substantive issues were intertwined, the district court should have treated the motion to dismiss for
14 lack of jurisdiction as a motion for summary judgment).

15 Plaintiff's substantive claims and this Court's jurisdiction are both premised on the ADA.
16 Thus, the issues of jurisdiction and substance are intertwined. *See Org. for Advancement of*
17 *Minorities with Disabilities v. Brick Oven Rest.*, 406 F. Supp. 2d 1120, 1126 (S.D. Cal. 2005).
18 The court will thus apply the summary judgment standard to Defendant's motion to dismiss for
19 lack of jurisdiction.

20 **III. DISCUSSION**

21 **A. ADA Claims**

22 Under the ADA, plaintiffs may only seek injunctive relief and attorney's fees. *See* 42
23 U.S.C. § 12188(a)(1); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968). Once a
24 defendant has remedied all ADA violations complained of by a plaintiff, the plaintiff's claims
25 become moot and he or she loses standing,³ which means the court no longer has subject-matter

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27 ³ This assumes the plaintiff had standing in the first case (which is in dispute here).
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1 jurisdiction over the ADA claim. *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130–31 (C.D. Cal.
2 2005). Of course, “[a] defendant claiming that its voluntary compliance moots a case bears a
3 formidable burden.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 170 (2000).

4 Defendant relies on Mr. Altwal’s report (its accessibility specialist) to show that the
5 Property is now compliant with all disability laws. Defendant further contends that because the
6 Property is now ADA compliant, Plaintiff can no longer obtain injunctive relief and has thus lost
7 his standing to bring his ADA claims. Mot. at 3–4.

8 The initial report from Mr. Altwal is too conclusory to support a finding that Defendant is
9 ADA-compliant. Exhibit C (“Altwal Report”), Dkt. 28-1. While the report determined that the
10 alleged barriers were corrected and that the Property is ADA-compliant, the report failed to
11 describe Mr. Altwal’s examination or provide factual support for Mr. Altwal’s claims. *See Kalani*
12 *v. Starbucks Corp.*, 81 F. Supp. 3d 876, 882–83 (N.D. Cal. 2015), *aff’d sub nom. Kalani v.*
13 *Starbucks Coffee Co.*, 698 F. App’x 883 (9th Cir. 2017) (“Conclusory opinions that the ‘facility is
14 free of non-compliant issues,’ or that particular features, *e.g.*, the accessible parking or point of
15 sale, ‘comply with all applicable access requirements,’” are “an insufficient basis on which to
16 grant summary judgment.”).

17 Plaintiff objected to Mr. Altwal’s report on the above grounds. *See* Opp. 5–6. In response,
18 Defendant provided a detailed supplemental declaration from Mr. Altwal with their Reply. *See*
19 Declaration of Bassam Altwal (“Altwal Decl.”), Dkt. No. 30-1. In the supplemental declaration
20 and accompanying exhibits, Mr. Altwal describes the features of the barriers that he examined, the
21 measurements he took, how he took them, and the applicable ADA and Unruh Act standards. *See*
22 *generally id.*

23 For example, Mr. Altwal’s report states after inspecting “the cross-slopes and running-
24 slopes of the accessible parking space and accessible access aisle, [and] the accessible path of
25 travel from the accessible parking space to the facility entrance,” he determined the parking space
26 and the path of travel are compliant with the 2010 ADA Standards for Accessible Design and the
27 2013 California Building Code. Altwal Decl. ¶ 12. Previously, the accessible path of travel had a
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1 slope that was greater than 5%. This made it noncompliant. *Id.* ¶ 9. The slope was cured by
2 installing a handrail along the accessible route. *See* Exhibit B, Dkt. 30-1. Mr. Altwal also noted
3 that the parking spaces without wheel stops left the accessible path of travel susceptible to
4 encroachment by overhanging vehicles. *See* Altwal Decl. ¶ 11. He confirmed that wheel stops
5 were installed to remedy that problem. *Id.* ¶ 12. The additional factual detail and support
6 included in this supplemental declaration suffices to support a finding that the alleged barriers are
7 no longer present at the Property. *See Johnson v. Montpelier One LLC*, 2020 WL 3504458,
8 at *7–8 (N.D. Cal. June 28, 2020).

9 Plaintiff has not—despite having the opportunity to do so—rebutted or objected to the
10 supplemental Altwal Declaration. Accordingly, the Court may consider Mr. Altwal’s
11 supplemental declaration and use it to conclude that (1) Defendant has remedied the alleged
12 barriers and (2) that no genuine dispute remains as to the issue of remediation. *See Getz v. Boeing*
13 *Co.*, 654 F.3d 852, 868 (9th Cir. 2011) (finding no error in the district court’s reliance on new
14 evidence submitted in reply paper where the party failed to object). Because Defendant has made
15 structural changes to its property to remedy the alleged violations, it is “absolutely clear that the
16 allegedly wrongful behavior [can] not reasonably be expected to recur.” *Friends of the Earth*, 528
17 U.S. at 170. Plaintiff’s ADA claims are thus moot and the Court dismisses the action for lack of
18 jurisdiction. Defendant’s motion to dismiss Plaintiff’s ADA claims is **GRANTED**.

19 **B. Unruh Act Claim**

20 The Court must now decide what to do with Plaintiff’s Unruh Act claim. This count
21 remains live “[b]ecause a claim for damages under the Unruh Act looks to past harm.” *Arroyo v.*
22 *Aldabashi*, 2018 WL 4961637, at *5 (N.D. Cal. Oct. 15, 2018). The Court can only retain this
23 claim if it exercises supplemental jurisdiction over it. *See* 28 U.S.C. § 1337(a). Supplemental
24 jurisdiction is discretionary. *See Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir.
25 1997), *supplemented by* 121 F.3d 714 (9th Cir. 1997). Defendant asks the Court to decline to
26 exercise jurisdiction over the Unruh Act claim. Mot. 5.

1 Courts “may”—and often do—“decline to exercise supplemental jurisdiction” if, as here, it
2 has “dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1337(c)(3); *see*
3 *also, e.g., Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 911 (9th Cir. 2011); *Yates v. Delano*
4 *Partners, LLC*, 2012 WL 4944269, at *2 (N.D. Cal. Oct. 17, 2012); *R.K. v. Hayward Unified Sch.*
5 *Dist.*, 2008 WL 1847221, at *2 (N.D. Cal. Apr. 23, 2008). As the Supreme Court and Ninth
6 Circuit have “often repeated,” “in the usual case in which all federal-law claims are eliminated
7 before trial, the balance of factors will point toward declining to exercise jurisdiction over the
8 remaining state-law claims.” *Acri*, 114 F.3d at 1001 (alterations omitted) (quoting *Carnegie-
9 Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

10 This is the usual case. First, the Court has not considered the merits of Plaintiff’s Unruh
11 Act claim, and so there is no judicial economy interest in retaining the case. Second, Plaintiff has
12 not articulated any significant inconvenience that he would face in refiling in state court. The
13 Court thus declines to exercise supplemental jurisdiction over Plaintiff’s Unruh Act claim.

14 **IV. CONCLUSION**

15 For the above reasons, pursuant to Federal Rule of Civil Procedure 12(b)(1), the Court
16 **GRANTS** Defendant’s motion to dismiss Plaintiff’s Complaint for lack of subject-matter
17 jurisdiction.

18 **IT IS SO ORDERED.**

19 Dated: August 17, 2020



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21 EDWARD J. DAVILA
22 United States District Judge
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